UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	§	Civil Action No. H-01-3624
	§	**(Consolidated)**
	§	
	§	CLASS ACTION
This Document Relates To:	§	
MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated,	§	
Plaintiffs,	§	
vs.	§	
ENRON CORP., et al.,	§	
Defendants.	§	

LEAD PLAINTIFF'S OPPOSITION TO DEFENDANT ANDREW S. FASTOW'S MOTION TO STAY DISCOVERY PENDING CRIMINAL PROCEEDINGS

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I. INTRODUCTION

It is no wonder that defendant Andrew Fastow fears criminal investigation and prosecution. Partnerships named after his family and funded by certain of the bank defendants were used as artifices to defraud Enron's investors. And he is one of the individual defendants who participated with bank defendants and the lawyer defendants in the creation of various bogus "special purpose entities" used to conceal billions in debt and losses on Enron's financial statements. However, Mr. Fastow's predicament is one of his own making.

Mr. Fastow asks the Court to stay this action against him because he wishes to avoid the inconvenience of being forced to choose whether or not to assert his Fifth Amendment rights. But his justification for the stay is not ample to downgrade vindication of the rights of Lead Plaintiff and the Class. An indefinite stay is an extraordinary remedy. Indeed, it is disfavored by the overwhelming majority of courts, and as demonstrated by numerous decisions, in these circumstances a stay is not justifiable even after indictment (which has yet to occur here).

Not only is it the interest of Lead Plaintiff, but there is a substantial public interest in the efficient prosecution of this class action. Lead Plaintiff, however, will suffer severe prejudice if discovery against Mr. Fastow is stayed. Staying this case for Mr. Fastow, who can more than adequately protect himself otherwise, would be especially prejudicial to Lead Plaintiff and the Class, because so many seek the limited funds that may satisfy the claims alleged herein. Mr. Fastow has evidence central to the allegations in this action. Not only is his evidence important in and of itself, but more so given the documents destroyed at Enron and Andersen. Mr. Fastow's stay request – sweeping in scope and infinite in duration – will certainly prolong this case and be a detriment to Lead Plaintiff's ability to prepare for trial by December 2003, as ordered by the Court. Memories will inevitably fade during a stay, and unidentified wrongdoers may escape justice through expiration of the limitations period. Were Mr. Fastow's motion granted, other Enron defendants may file similar discovery requests, which could further delay these proceedings. The stay Mr. Fastow seeks also risks multiple adjudications of the merits of this case if all criminal proceedings against Mr. Fastow are not completed significantly before trial.

Mr. Fastow's generalized claims of prejudice by being forced to choose whether or not to assert his Fifth Amendment privilege ring hollow. ***First,*** Mr. Fastow already chose to assert the protections of the Fifth Amendment to avoid Congressional investigations. Before the nation on February 7, 2002, Mr. Fastow did this at a hearing of the House Energy and Commerce Oversight and Investigations Subcommittee. Mr. Fastow's speculation that further asserting his Fifth Amendment privilege would have anything more than a negligible effect in these circumstances does not justify the stay Mr. Fastow seeks. ***Second,*** while Mr. Fastow has evidence that might not implicate him, he has already demonstrated more than sufficient means to protect – not prejudice – himself.

Mr. Fastow also contends that allowing discovery to proceed against him will give the criminal prosecution – if there is one – an unfair advantage. But the government is not a party to the civil cases against Mr. Fastow, and he offers no evidence that Lead Plaintiff has pledged to share discovery with the government. His conjecture is insufficient to warrant a discovery stay, from which Lead Plaintiff and the Class will suffer severe prejudice.

This enormous fraud has sent tremors throughout our public securities markets unlike anything in recent memory. Thousands of investors have lost significant portions of their retirement funds and institutions and pension funds have suffered billions in losses. The continuous high-profile coverage and reporting of the Enron fraud in the popular and financial media demonstrates the importance the public places on a just resolution of this financial catastrophe and underscores the significance of this case to investor confidence in our securities markets ***and*** in our legal system to take prompt and decisive action to protect those victimized by defendants' deliberate violations of the federal securities laws.

The Court should not reward Mr. Fastow's conduct by delaying this action, and Mr. Fastow's motion for a discovery stay should be denied.

II. ARGUMENT

A. Mr. Fastow Bears the Burden to Demonstrate That His Purported Inconvenience Outweighs the Interests of Lead Plaintiff and the Class

Mr. Fastow has no constitutional right to stay civil proceedings pending the outcome of related criminal proceedings. *E.g., United States v. Kordel*, 397 U.S. 1, 11 (1970); *SEC v. First Fin. Group, Inc.*, 659 F.2d 660, 666-67 (5th Cir. 1981). Accordingly, Mr. Fastow bears the burden of demonstrating that his inconvenience in determining whether to assert his Fifth Amendment rights in this action outweighs the prejudice Lead Plaintiff and the Class of investors in Enron securities will suffer from a delay in the proceedings against him. "In the absence of substantial prejudice to the rights of the parties involved, parallel proceedings are unobjectionable under our jurisprudence." *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1374 (D.C. Cir. 1980) (en banc). Although the Court in its discretion may decide to stay civil proceedings "when the interests of justice seem[] to require such action," *Kordel*, 397 U.S. at 12 n.27; *see KMart Corp. v. Aronds*, No. H-96-1212, slip op. at 4 (S.D. Tex. Dec. 12, 1996) (attached to Fastow Motion), a stay nevertheless is an "'extraordinary remedy,'" *Sterling Nat'l Bank v. A-1 Hotels Int'l, Inc.*, 175 F. Supp. 2d 573, 576 (S.D.N.Y. 2001) (citation omitted), disfavored by the majority of courts. *IBM v. Brown*, 857 F. Supp. 1384, 1387 (C.D. Cal. 1994) (stating it "is the rule, rather than the exception" that civil and criminal cases proceed together).

The decision to stay civil proceedings because of parallel criminal proceedings should be made "in light of the particular circumstances and competing interests involved in the case." *Fed. Sav. & Loan Ins. Corp. v. Molinaro,* 889 F.2d 899, 902 (9th Cir. 1989). *Accord KMart*, slip op. at 4-6. The Court should consider 1) the interests of Lead Plaintiff in proceeding expeditiously and the potential prejudice of a delay; 2) the extent to which Mr. Fastow's Fifth Amendment rights are implicated; 3) the burden of any particular aspect of any proceeding on Mr. Fastow; 4) the convenience of the Court in the management of its cases and the efficient use of judicial resources; 5) the interest of absent class members and other persons not parties to the Enron litigation; and 6) the interest of the public in the pending civil and criminal litigations, if any. *See, e.g., KMart,* slip. op. at 4-5; *Molinaro*, 889 F.2d at 902-03; *Arden Way Assocs. v. Boesky*, 660 F. Supp. 1494, 1497

(S.D.N.Y. 1987). The balance of interests weighs strongly against staying discovery against Mr. Fastow. *See, e.g., KMart*, slip op. at 4; *Wehling v. Columbia Broad. Sys.*, 608 F.2d 1084, 1089 (5th Cir. 1979).

B. Staying Discovery Against Mr. Fastow Will Prejudice Lead Plaintiff and the Class

1. A Stay Would Seriously Impede the Development of This Case and Preparation for Trial in December 2003

A party is not entitled to delay resolution of a civil action due to the inconvenience of choosing whether to assert his Fifth Amendment right if his adversary's case could deteriorate as a result. *See, e.g., Wehling*, 608 F.2d at 1089; *SEC v. Incendy*, 936 F. Supp. 952, 956 (S.D. Fla. 1996); *Clark v. Lutcher*, 77 F.R.D. 415, 418 (M.D. Pa. 1977). "The plaintiff is entitled to a speedy discovery process. This is particularly true in the context of complex litigation which must proceed in an efficient manner." *Digital Equip. Corp. v. Currie Enters.*, 142 F.R.D. 8, 12 (D. Mass. 1991). Here, as in *Digital*, Mr. Fastow's purported inconvenience does not outweigh the need for this complex litigation to proceed efficiently.

Delaying discovery against Mr. Fastow threatens the progress of this case. Significant allegations in Lead Plaintiff's Consolidated Complaint pertain to the creation, funding, and function of various bogus "special purpose entities" used to conceal billions in debt and losses on Enron's financial statements. ¶¶435-447. Mr. Fastow participated with bank defendants and the lawyer defendants in the creation of those entities and the partnerships named after his family, which were also used as artifices to defraud Enron's public investors. Notwithstanding Mr. Fastow's apparent intent to assert his Fifth Amendment privilege in response to incriminating questions, Mr. Fastow can provide evidence that will not implicate him but will nonetheless be critical to Lead Plaintiff's development of this case. For example, Mr. Fastow has substantial knowledge about the relationships of defendant banks to LJM2. But, many events concerning material facts alleged by Lead Plaintiff occurred in November and December 1997, more than four years ago. ¶¶436-439. Not only will Mr. Fastow's recollection of these events continue to fade if discovery is postponed, but so will the memories of any undisclosed witnesses Mr. Fastow identifies. Witnesses and

documents known solely to Mr. Fastow may relocate or be lost. Moreover, a discovery delay will encourage other defendants to file like motions, which could further prejudice plaintiffs.

A stay would also exacerbate difficulties in proving this case due to intentionally destroyed evidence. To (among other things) minimize the fallout from Enron's writedown and restatement, which led to Enron's bankruptcy, Andersen and lead auditor David Duncan destroyed thousands of documents. These facts are confirmed by Andersen's public admissions, the indictment of Andersen for obstruction of justice, and Duncan's guilty plea to charges of obstruction of justice. Enron and its senior officers also ordered relevant documents to be destroyed after the SEC initiated an investigation of the Company. According to former Enron Project Manager Maureen Raymond Castaneda, numerous documents were gathered and then shredded by Enron personnel after the Company was informed that the SEC was conducting an investigation. Shredded documents obtained by Ms. Castaneda included those documents designated "Confidential" and others related to Chewco and JEDI-II. *See* Declaration of G. Paul Howes in Support of Amalgamated Bank's Third *Ex Parte* Application for Particularized Expedited Discovery from Defendant Andersen and Defendant CEO Lay to Preserve Evidence, filed January 22, 2002. The longer it takes for knowledgeable non-parties to be identified, the greater the danger of additional evidence being destroyed. Evidence spoliation already hampers this case. The need to proceed expeditiously, without the attendant harms of a stay is significant and it outweighs Mr. Fastow's claims of inconvenience.

2. A Stay Would Inhibit Lead Plaintiff's Ability to Identify Other Culpable Parties

Lead Plaintiff and the Class need discovery from Mr. Fastow to identify other culpable parties. The Supreme Court has held, "Litigation instituted pursuant to §10(b) and Rule 10b-5 ... must be commenced within one year after the discovery of the facts constituting the violation and within three years after such violation." *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 364 (1991). Many of the events engendering Lead Plaintiff's claims for securities fraud – in particular, as to the formation, operations and disclosures related to LJM-1 and LJM-2 and other SPEs designed by Mr. Fastow, took place in 1999 and early 2000. ¶¶448-450, 466-481. Valid

claims may soon be stale if Lead Plaintiff cannot identify and locate other wrongdoers because "tolling principles do not apply to [the three-year limitations] period." *Lampf*, 501 U.S. at 363. Staying discovery against Mr. Fastow increases the likelihood that other offenders may escape liability.

In *Digital*, the defendant was indicted but the court refused to stay a parallel civil proceeding due to similar concerns. *See* 142 F.R.D. at 12. The court concluded that delay exacts a toll on plaintiffs, for "memories become stale with the passage of time ... [and] plaintiff needs to proceed forthwith with discovery in order to locate additional parties before the expiration of the statute of limitations." *Id. See also Clark*, 77 F.R.D. at 418. "[I]t would be perverse if plaintiffs who claim to be the victims of criminal activity were to receive slower justice than other plaintiffs because the behavior they allege is sufficiently egregious to have attracted the attention of the criminal authorities." *Sterling Nat'l*, 175 F. Supp. 2d at 575.

3. Indefinite in Duration, the Stay Mr. Fastow Requests Will Delay Final Resolution of This Case and Risk Multiple Adjudications

In addition, the stay Mr. Fastow requests – postponement of discovery and trial, if necessary, until conclusion of all criminal proceedings – is indefinite in duration. The collapse of Enron is complex. It involves numerous offshore partnerships and their intricate relationship to Enron and its former officers and senior executives. As judge Lynch stated in *Sterling*:

> There is no telling how complicated the government's investigation may be, whether the allegations ... are merely the tip of an iceberg that will result in a lengthy and open-ended investigation, what priority the government assigns to the investigation, whether it will result in charges that will have to be litigated, or how time-consuming the resulting criminal case will be.

175 F. Supp. 2d at 577. *Accord Quint v. Freda*, No. 98 civ. 4285 (DLC), 1999 U.S. Dist. LEXIS 1399, at *6 (S.D.N.Y. Feb. 11, 1999). The Court must guard against "the ossification of rights which attends inordinate delay." *Hines v. D'Artois*, 531 F.2d 726, 737 (5th Cir. 1976). Any criminal investigation of Mr. Fastow's role into the collapse of Enron may take years to complete and in the interim other investigations will compete for the government's resources. It is difficult to conceive how a trial could proceed against Mr. Fastow by December 2003 if the stay he seeks were granted. Thus, Mr. Fastow's stay would delay final resolution of this case until well after December 2003 and

multiple adjudications here would likely occur. The result would be a waste of judicial and litigant resources.

4. A Stay Would Prejudice Lead Plaintiff's Ability to Secure Potentially Limited Funds to Which Multiple Parties Have Claims

There are multiple litigations and multiple parties that will be claimants to potentially limited funds that may satisfy the enormous damages exacted upon Lead Plaintiff and the Class. As Judge Pollack stated in *Boesky*:

> Stalling the case for a defendant who has ample means to protect himself otherwise, or fragmenting Mr. Boesky's participation would be counter-productive and prejudicial to plaintiffs, especially where there are so many claimants to the potentially limited funds for satisfaction of the potential damages in this and related litigation in which Mr. Boesky is involved.

660 F. Supp. at 1497. Lead Plaintiff should not be required to downgrade its rights to limited funds because Mr. Fastow does not stand to gain from Lead Plaintiff's prosecution of this case.

C. The Interests of the Class Weigh Heavily in Favor of Denying Mr. Fastow's Motion for a Discovery Stay

"[T]he public interest in the integrity of securities markets militates in favor of the efficient and expeditious prosecution of these civil litigations." *Id.* at 1500. Private actions such as Lead Plaintiff's lawsuit are essential weapons in the enforcement of the securities laws. *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985). "Protection of the efficient operation of the securities markets ... from fraudulent ... practices," wrote the Fifth Circuit, "may require prompt civil enforcement which can not await the outcome of a criminal investigation." *First Fin.*, 659 F.2d at 667.

Lead Plaintiff is not the only party who will suffer prejudice if discovery is stayed against Mr. Fastow. Numerous absent Class members will be forced to wait longer for their day in court. *See In re Gaming Lottery Sec. Litig.*, No. 96 civ. 5567 (RPP), 2000 U.S. Dist. LEXIS 3803, at *3 (S.D.N.Y. Mar. 28, 2000) (considering interests of absent class members). Further, it is "worth noting that the interests of the Court militate in favor of judicial economy by not trying the same action twice." *Quint*, 1999 U.S. Dist. LEXIS 1399, at *6. Here, there is a substantial "risk of multiple adjudications ... if the stay is granted." *Incendy*, 936 F. Supp. at 956. The Court has set a

trial date of December 2003. But due to the complexity and pervasive nature of the Enron fraud, the government may be unable to indict – let alone try – Mr. Fastow before the trial date.

Finally, a significant delay in this litigation due to an indefinite stay of discovery threatens to erode public confidence in the judicial system. As the Court observed in its Scheduling Order of February 28, 2002, "the eyes of the nation are on this Court and the civil justice system to see if we are up to the challenge of giving to all parties in these suits their day in court. It is the nation's impression that the justice system grinds slowly in a Dickensian fashion, and it is the hope of this Court that that impression can be changed by an efficient resolution of these cases." Order at 2. Adherence to the Scheduling Order – as it did in denying defendants' requests for motions-to-dismiss extensions – reaffirms the Court's resolve. Judge Pollack's response to a similar request to stay discovery by the notorious insider-trader Ivan Boesky is instructive:

> It is plainly ludicrous for Mr. Boesky to argue that it is "unfair" to compel him to face the civil lawsuits against him which are the creations of his own misconduct. The plight which he imagines that he is in stems solely from his own activities. Surely it would be anomalous to suspend plaintiffs' rights in these civil litigations because they will deal with Mr. Boesky's misconduct.

Boesky, 660 F. Supp. at 1497. Likewise, "That defendant's conduct also resulted in a criminal charge against him should not be availed of by him as a shield against a civil suit and prevent plaintiff from expeditiously advancing its claim." *Paine, Webber, Jackson & Curtis, Inc. v. Malon S. Andrus, Inc.*, 486 F. Supp. 1118, 1119 (S.D.N.Y. 1980).

This case carries much greater significance than even the *Boesky* case. The Enron fraud has shaken – and continues to shake – the financial markets of the United States. Thousands of investors have seen their retirement funds and life's savings disappear, and pension funds such as Lead Plaintiff's have lost billions of dollars due to Mr. Fastow's and the other defendants' illegal conduct. The public demands a speedy resolution of this litigation.

D. Mr. Fastow Fails His Burden and Does Not Demonstrate That His Purported Inconvenience Outweighs the Interests of Lead Plaintiff and the Class

1. The Speculative Threat of Indictment or Indictment, Alone, Does not Justify a Stay Here

Mr. Fastow urges the Court to stay discovery against him because he faces the prospect of criminal prosecution. But he has not been indicted, which he acknowledges. His motion to stay may be denied on that ground alone. *See, e.g., United States v. Private Sanitation Indus. Ass'n*, 811 F. Supp. 802, 805 (E.D.N.Y. 1992); *Sterling Nat'l*, 175 F. Supp. 2d at 576. And Mr. Fastow's authority endorses this proposition. *See Trustees of the Plumbers & Pipefitters Nat'l Pension Fund v. Transworld Mech.*, 886 F. Supp. 1134, 1139 (S.D.N.Y. 1995) ("stays will generally not be granted before an indictment is issued"). The mere possibility of criminal prosecution is insufficient grounds for staying discovery against Mr. Fastow. *See, e.g., SEC v. Zimmerman*, 854 F. Supp. 896, 899 (N.D. Ga. 1993); *Clark*, 77 F.R.D. at 418; *Incendy*, 936 F. Supp. at 954. Absent media speculation, Mr. Fastow offers no evidence of an impending indictment. Although the existence of an indictment alone does not warrant a stay of parallel civil proceedings, many courts have found that when there is ***no*** indictment, the "extraordinary remedy" of a discovery stay is unwarranted. *Sterling Nat'l*, 175 F. Supp. 2d at 576. *See also Hix Corp. v. Nat'l Screen Printing Equip., Inc.*, No. 00-2111-KHV, 2000 U.S. Dist. LEXIS 10543, at *5 (D. Kan. July 6, 2000).

Mr. Fastow relies on the Fifth Circuit's decision in *Wehling* and the Court's decision in *KMart*. But neither case supports his motion. ***First***, neither involved a complex litigation, as here. Thus, the prejudice of a stay here is more damning and the burden on judicial and litigant resources more onerous. ***Second***, neither carried the substantial public interests calling for expeditious resolution or the multiple claimants competing for potentially limited funds.

Wehling is distinguishable on a number of additional grounds. In *Wehling*, the trial court dismissed an action with prejudice after the plaintiff refused to answer specific deposition questions "related to the subject matter of [a] pending grand jury" investigating his conduct and before which he had appeared five times. 608 F.2d at 1086. The question on appeal was "whether, under the circumstances of this case, plaintiff should have been required to forego a valid cause of action in

order to exercise his constitutional right to avoid self-incrimination." *Id.* at 1087. The Fifth Circuit held, "When plaintiff's silence is constitutionally guaranteed, dismissal is appropriate only where other, less burdensome, remedies would be an ineffective means of preventing unfairness to defendant." *Id.* at 1088. But Mr. Fastow does not face the prospect of foregoing a valid cause of action as a plaintiff if he asserts his Fifth Amendment rights.[1]

In *Kmart*, in contrast to this case, four defendants had already been indicted on multiple counts and the SEC had filed suit for illegal insider trading when defendants sought a discovery stay. Slip op. at 2-3, 6. Although the Court stayed all discovery, it did so only because "postponing discovery with regard to those Defendants whose Fifth Amendment rights against self incrimination have been implicated by the pending criminal indictments" would have "present[ed] the Court with numerous occasions to determine the scope of the stay." *Id.* at 6. Many of the "corporate defendants in the civil action were formed and ... controlled by" one of the indicted defendants, raising the specter that "some of these corporate defendants may not be able to provide an agent who could give the information likely to be demanded by the Plaintiffs without fear of self incrimination." *Id.* at 5-6. Given the potential for judicial waste and unnecessary litigation costs due to these peculiar facts, the Court simply concluded a complete stay was warranted. *Id.* at 6. Such concerns are absent here, for, among other reasons, Mr. Fastow controls none of the corporate defendants.[2] Indeed, the burden on judicial and litigant resources and the public interest in expeditious resolution far outweigh Mr. Fastow's purported inconvenience here.

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[1]Lead Plaintiff would argue at trial for an adverse ***inference***, but this would not automatically mean an adverse judgment would be entered.

[2]*Plumbers & Pipefitters* and *Volmar Distribs. v. New York Post Co.*, 152 F.R.D. 36 (S.D.N.Y. 1993), both of which are non-class cases, are also inapposite. In *Plumbers & Pipefitters*, the court stayed discovery in a parallel civil action because the defendants had already been indicted and the criminal case was "expected to be resolved" within six months. 886 F. Supp. at 1140. The court also noted that, unlike here, "the loss of evidence may not be as serious as plaintiffs believe." *Id.* The defendants in *Volmar Distribs.*, were under indictment. 152 F.R.D. at 39. Moreover, neither court was confronted with the substantial document destruction that has occurred here or the significant public interests implicated in this litigation.

2. Mr. Fastow's Purported Inconvenience in Being Forced to Choose Whether or Not to Assert His Fifth Amendment Privilege Does Not Justify a Stay

Mr. Fastow argues he faces a "Hobson's choice ... [of] sacrificing his Fifth Amendment privilege or invoking that privilege or risking severe prejudice in the defense of this civil action" if discovery is not stayed. *See* Fastow Mot. at 8. But this is ***not*** unconstitutional. *United States v. White*, 589 F.2d 1283, 1287 (5th Cir. 1979). "Forcing an individual to risk non-criminal disadvantage by remaining silent for fear of self-incrimination in a parallel criminal proceeding does not rise to the level of an unconstitutional infringement." *Hilliard v. Black*, No. 1:00CV80 MMP, 2000 U.S. Dist LEXIS 20329, at *10 (N.D. Fla. Nov. 9, 2000). Indeed, "'the discomfort of defendant's position does not rise to the level of deprivation of due process.'" *See SEC v. Grossman*, 121 F.R.D. 207, 210 (S.D.N.Y. 1987) (citation omitted). In the Fifth Circuit, "defendant cannot be free from conflicting concerns, and in any case, defendant must weigh the relative advantages of silence and explanation." *White*, 589 F.2d at 1287. This is particularly true here where Mr. Fastow is not even under indictment.

Mr. Fastow also overstates the harm that may result if he pleads the Fifth Amendment in this litigation. This will not prevent Mr. Fastow from assisting his attorneys in the defense of this litigation. *Private Sanitation*, 811 F. Supp. at 806. Moreover, by asserting his Fifth Amendment privilege, Mr. Fastow could actually hinder Lead Plaintiff's case against him. Mr. Fastow, therefore, does not "risk[] severe prejudice" by refusing to testify in this matter. Fastow Mot. at 8. "While the 'choice between testifying or invoking the Fifth Amendment may be difficult, ... it does not create the basis for a stay.'" *IBM*, 857 F. Supp. at 1389 (quoting *Comptroller of Currency v. Lance*, 632 F. Supp. 437, 442 (N.D. Ga. 1986)).

Mr. Fastow speculates that prosecutors would receive an unfair advantage if discovery against him were allowed to continue. *See* Fastow Mot. at 10. Such concerns are present only if the government brings parallel civil and criminal actions, a situation Mr. Fastow does not face. *See Sterling Nat'l*, 175 F. Supp. 2d at 579. In *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1199-1200 (Fed. Cir. 1987), unlike here, the government was a party to both the parallel civil and criminal litigations. The risk of the abuse of discovery was thus much greater. Were such circumstances

present, the mere possibility of misconduct would still not merit a stay. *IBM*, 857 F. Supp. 1392; *Zimmerman*, 854 F. Supp. at 899. Moreover, Mr. Fastow offers no evidence even suggesting that the securities fraud litigation is a mere stalking-horse for the U.S. Attorney. In any event, a more limited remedy than the one Mr. Fastow requests can prevent the prejudice he fears. *See Hines*, 531 F.2d at 737 (declaring that the scope of a stay must be sufficiently limited). For instance, the Court can issue a protective order prohibiting the use of Mr. Fastow's deposition answers, interrogatory responses and answers to requests for admission in any criminal proceeding brought against him by the U.S. Attorney, except in connection with perjury charges or for purposes of impeachment. *See United States v. Parcels of Land*, 903 F.2d 36, 45 (1st Cir. 1990). The draconian remedy of a discovery stay against Mr. Fastow is unwarranted.

III. CONCLUSION

The balance of interests militate heavily in favor of denying Mr. Fastow's motion. Any prejudice Mr. Fastow may suffer as a result of defending this litigation while a grand jury investigates his conduct is of his own making. But Lead Plaintiff and the Class will suffer severe harm if a stay is granted. Lead Plaintiff's and the Class's claims to potentially limited funds will be compromised, and there will be a substantial additional burden on judicial and litigant resources. Evidence will be lost through fading memories, destruction of evidence by participants in the Enron fraud may continue, wrongdoers may escape liability for their illegal conduct through expiration of the limitations period. For the foregoing reasons, Lead Plaintiff respectfully requests the Court to deny Mr. Fastow's motion to stay discovery.

DATED: May 6, 2002

Respectfully submitted,

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DECLARATION OF SERVICE BY E-MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interest in the within action; that declarant's business address is 401 B Street, Suite 1700, San Diego, California 92101.

2. That on May 6, 2002, declarant served the LEAD PLAINTIFF'S OPPOSITION TO DEFENDANT ANDREW S. FASTOW'S MOTION TO STAY DISCOVERY PENDING CRIMINAL PROCEEDINGS by sending via e-mail, facsimile or UPS overnight to the parties as indicated on the attached Service List, pursuant to the Court's April 10, 2002 Order Regarding Service of Papers and Notice of Hearings.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 6th day of May, 2002, at San Diego, California.

Debbie Granger

DEBBIE GRANGER

SERVICE LIST
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